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No. 85-6461

# In The Supreme Court Of The United States

OCTOBER TERM, 1985

EARLINE MARTIN, Petitioner,

vs.

STATE OF OHIO, Respondent.

*ON WRIT OF CERTIORARI*
*TO THE SUPREME COURT OF OHIO*

## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF FOR OHIO PUBLIC DEFENDER COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE**

The Ohio Public Defender Commission hereby respectfully moves for leave to file the attached brief **amicus curiae** in support of Petitioner in this case. The consent of the attorney for the Petitioner has been obtained. The consent of the attorney for Respondent was requested but refused.

The interest of the Ohio Public Defender Commission in this case arises from the fact that it and other appointed counsel in Ohio represent many criminal defendants similarly

situated to Petitioner. The issue raised by Petitioner of concern to **Amicus** is Ohio's requirement that the accused bear the burden of proving a claim of self-defense by a preponderance of evidence. **Amicus** represents the interests of a large number of Ohio attorneys who believe that Ohio law on this issue is in conflict with the Due Process Clause of the Fourteenth Amendment.

In the instant case, **Amicus** believes the resolution of this issue will depend on whether this Court finds that self-defense negates any facts necessary to prove the crime of aggravated murder under Ohio law. **See Patterson v. New York**, 432 U.S. 197, 206-207 (1977). While Petitioner's argument broadly addresses this issue, **Amicus** believes that the brief it is requesting permission to file contains a more detailed analysis of the pertinent elements of Ohio law and their relationship to self-defense. Additionally, the brief **amicus curiae** contains a discussion

of where the federal courts and other states stand on this issue, not contained in Petitioner's brief.

For these reasons, **Amicus** requests leave to file the attached brief **amicus curiae** in this case.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b) of this Court, I, Gregory L. Ayers, a member of the bar of this Court, hereby certify that on this _____ day of July, 1986, three copies of the foregoing Motion for Leave to File Brief **Amicus Curiae** and Brief **Amicus Curiae** were mailed, first-class postage prepaid, to JAMES R. WILLIS, Esquire, Suite 610, Bond Court Building, 1300 East Ninth Street, Cleveland, Ohio 44114, Counsel for Petitioner; and to JOHN T. CORRIGAN, Cuyahoga County Prosecuting Attorney, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, Counsel for Respondent. I further certify that all parties required to be served have been served. Petitioner Earline Martin's address is: Ohio State Reformatory for Women, 1479 Collins Avenue, Marysville, Ohio 43040.

_____
GREGORY L. AYERS
Counsel for **Amicus Curiae**

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## INTEREST OF AMICUS CURIAE

The Ohio Public Defender Commission was created by Ohio law in 1976. Its purpose is to provide, supervise and coordinate legal representation at state expense for indigent and other persons. Ohio Revised Code § 120.01. One of its primary responsibilities is to provide legal representation to criminal defendants in felony trials, appeals and post-conviction matters. Additionally, the Commission provides technical aid and assistance in criminal cases to county public defenders and appointed counsel throughout the State of Ohio. As a result, the Commission is concerned with the case at bar and all other cases relating to criminal law and procedure which affect the rights of criminal defendants. Petitioner's written consent to the Commission's filing a brief **amicus curiae** in support of Petitioner has been filed with the Clerk's office. Respondent's consent was requested but refused.

The Commission has represented clients in criminal cases before this Court, the Ohio Supreme Court, the United States Court of Appeals for the Sixth Circuit, and the United States District Courts for the Northern and Southern Districts of Ohio. The Commission has also filed **amicus** briefs in various Ohio courts in other actions which involved the rights of criminal defendants.

The resolution of the issue in this case will directly affect how Commission attorneys and other members of the criminal defense bar in Ohio handle cases involving the issue of self-defense. Also, other Ohio defendants, similarly situated to Petitioner, are being represented by Commission attorneys and will be directly affected by the outcome.

## SUMMARY OF ARGUMENT

**Amicus** submits that the decision below is erroneous for three primary reasons. First, the defense of self-defense establishes that the actor was engaged in lawful,

innocent behavior. Since **In re Winship**, 397 U.S. 358 (1970), prohibits the State from requiring a defendant to prove her innocence, the State of Ohio is barred from burdening her with proving self-defense.

Second, under an elements analysis stemming from **Mullaney v. Wilbur**, 421 U.S. 684 (1975), and **Patterson v. New York**, 432 U.S. 197 (1977), self-defense negates several elements of the crime of aggravated murder: (1) unlawfulness; (2) "peace and dignity" requirement of the Ohio Constitution [Article IV, § 20 and Revised Code § 2941.06]; (3) criminal conduct; (4) the voluntary act requirement [**see** Revised Code § 2901.21(C)]; and (5) criminal intent (purposely, with prior calculation and design) [**see** Revised Code § 2903.01(A)].

Third, due process requires that the State bear the burden of proving beyond a reasonable doubt that the accused's actions were unlawful and not in self-defense.

## ARGUMENT

### I.

**SINCE SELF-DEFENSE IS CONSTITUTIONALLY PROTECTED INNOCENT CONDUCT, AN ACCUSED CANNOT BE REQUIRED TO BEAR THE BURDEN OF PROOF ON THAT ISSUE.**

The State of Ohio cannot make self-defense a crime. Any such attempt by the State violates both its own Constitution[1] and several provisions of the Federal Constitution.

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1. Article I, Section 1 of the Ohio Constitution provides, in part:

> "All men are, by nature, free and independent and have certain inalienable rights, among which are those of enjoying and defending life . . . and obtaining . . . safety" (emphasis added).

Article I, Section 4 states that:

> "The people have the right to bear arms for their defense and security . . ." (emphasis added).
>
> This latter provision is "intended to . . . afford the citizen [a] means for his defense of self and property." **State v. Hogan**, 63 Ohio St. 202, 218, 58 N.E. 572, 575 (1900).

First, a command by the state that one whose life is threatened by a felonious assault should die rather than kill his assailant is as unenforceable as it is absurd.

> ". . . the law cannot prevent [self-defense] by punishment, because a threat of death at some future time can never be a sufficiently powerful motive to make a man choose death now in order to avoid the threat." O. W. Holmes, Jr., The Common Law 47 (1881).

For the state to command its citizens to die rather than to protect their own lives would be a denial of life without due process of law.[2]

Second, to punish one whose only "crime" was to save her own life when attacked by a wrongdoer would be violative of the cruel and

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2. In **State v. Hardy**, 60 Ohio App.2d 325, 329, 397 N.E.2d 773, 776 (1978), the Court held:

> "The Fifth and Fourteenth Amendments to the United States Constitution provide that a person may not be deprived of his life, . . . without due process of law. Obviously, the state may not require and does not intend that an individual succumb to his attacker and possibly forfeit his life rather than act in self defense."

unusual punishment provision of the Eighth Amendment.[3] Equally as important, any attempt to deprive the people of the "right" of self-defense by making self-defense criminal would deny them constitutional rights reserved and protected by substantive due process under the Fourteenth Amendment and the rights reserved to the people under the Ninth Amendment.

With respect to the Fourteenth Amendment substantive due process claim, the question is whether the right is "so rooted in the tradition and conscience of our people as to be ranked as fundamental." **Snyder v. Massachusetts**, 291 U.S. 97, 105 (1934), **quoted**

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3. The Eighth Amendment prohibits cruel and unusual punishment--including punishment that is disproportionate to the "offense." **Coker v. Georgia**, 433 U.S. 584 (1977). Punishment for <u>any</u> lawful act, including self-defense, is both disproportionate and cruel and unusual. **See also Holloway v. McElroy**, 632 F.2d 605, 627, n. 35, and 636, n. 49, **cert. denied**, 451 U.S. 1028 (1981), noting a "plausible argument" could be made that criminalizing self-defense would violate the prohibition against cruel and unusual punishment provision and/or the due process clause.

**with approval, Patterson v. New York**, 432 U.S. 197, 201-202 (1977). It should not be open to question that self-defense is such a right. As Judge Murnaghan wrote in **Griffin v. Martin**, 785 F.2d 1172, 1180, n. 24 (4th Cir. 1986) (pending following rehearing **en banc**):

> ". . . Since a time before the formation of our nation, and hence the existence of a Due Process Clause . . . a homicide committed in self-defense simply has been no crime."

At least since the sixteenth century, a homicide which resulted from an act done in self-defense was justifiable and not unlawful. **Mullaney v. Wilbur**, 421 U. S. 684, 692

(1975).[4] It was (and is) "lawful and justifiable to resist certain attacks, even by the death of the assailant, and the party [was] without blame." East, Treatise of the Pleas of the Crown 217 (1803).

When courts and commentators alike speak of self-defense, they speak in terms of the "right of self-defense." This phrase is not accidental, for the roots of self-defense run deep within American common law, finding its seeds in English common law. Blackstone described three primary and overriding rights

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4. Wharton's Criminal Evidence, § 224, 479 (13th ed. 1972); I, Warren on Homicide § 54, at 162 (1914); I, Warren, **supra**, at 163:

> "Criminal homicide is the unlawful killing of a human being . . ." (footnote omitted) (emphasis added). **See also** §§ 63, 64, 68.

I, Warren, **supra**, § 143, at 617; 27 Ohio Jur. 2d, Homicide, § 89, at 629 (1957):

> "It is universally recognized that one is not punishable criminally for taking the life of another person when he has been put under the necessity or apparent necessity of doing so, without any fault on his own part in order . . ."

retained by individuals "which [are] not required to be sacrificed to public convenience." 1 Blackstone, Commentaries on the Laws of England, Ch. 1, p. 129 (1783). These three rights are "the right of personal security; the right of personal liberty; and the right of private property." **Id.**

> "The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation . . . For whatever is done by a man, to save life or member is looked upon as done upon the highest necessity and compulsion." **Id.**, at 129-130.

Even under the tyrannical reign of slavery it was acknowledged that the slave had the right to act in self-defense in order to preserve his own life.[5] Congressman John A. Bingham, author of Section I of the

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5. **State v. Will**, 18 N.C. 131, 171 (1834).

Fourteenth Amendment, treated self-defense as "the acknowledged right of man . . ."[6]

This right was also recognized in early Federal case law.

> "Where crime is committed with impunity . . . those unprotected by other sanctions . . . [are compelled] . . . to rely upon physical force for the vindication of their natural rights. There is no other remedy and no other security." **United States v. Rhodes**, 27 Fed. Cas. 785 (Cir. Ct. Ky. 1866).[7]

The right to defend one's self is a basic fundamental right rooted in such basic documents as the Declaration of Independence, stating: "that all men are endowed by their creator with certain inalienable rights . . .

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6. John A. Bingham, The Argument of John A. Bingham, Special Judge Advocate (Washington 1865) 13-14, quoted in Allen, "A Rhetorical Analysis of the Speaking of John A. Bingham with Emphasis on His Role in the Trial of the Lincoln Conspirators" (Ph.D Dissertation, Ohio State University 1963).

7. **See also Wallace v. United States**, 162 U.S. 446 (1896); **Beard v. United States**, 158 U.S. 550, 563 (1895); **Thompson v. United States**, 155 U.S. 271, 283 (1894); **Gourke v. United States**, 153 U.S. 183 (1893); and **Allen v. United States**, 164 U.S. 492 (1894).

among these are life." As recognized by the Court of Appeals of Texas:

> "Love of life and its preservation is the first great law of nature. Sir Wm. Blackstone says, 'Self-defense, therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society.'" **Reed v. State**, 11 Tex. Ct. App. 509, 517 (1882) (emphasis added).

Thus, the right of lawful self-defense has been recognized as an "inalienable right," **Id.**, at 517.[8]

In **United States v. Morris**, 125 F. 322 (E.D. Ark. 1903), Judge Trieber held that the right to lease land was a fundamental and inalienable right of every freedman. Can it be doubted that the right to defend one's own life is at least as "fundamental" and "inalienable" as the right to lease land for farming purposes?

> ". . . some truths are indeed self-evident. When a killing is, by

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8. **See also** I, Warren on Homicide, § 148, p. 639.

> reason of self-defense, rightful, not wrongful, i.e., is lawful, there is no crime." **Griffin v. Martin**, 785 F.2d 1183 (Murnaghan, J.) (pending following rehearing **en banc**).

The Ninth Amendment also recognizes that:

> "There are additional fundamental rights, protected from governmental infringement which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments." **Griswold v. Connecticut**, 381 U.S. 479, 488 (1965) (per Justice Goldberg).

The right to privacy recognized in **Griswold** would be a hollow guarantee if, in a time of necessity, a person could not defend herself from unlawful attacks without subjecting herself to criminal prosecution. This would be an unconscionable governmental "invasion of [one's] indefeasible right of personal security," **Boyd v. United States**, 116 U.S. 616, 630 (1886), and would surely sweep too broadly into an area of constitutionally protected freedom.

Ultimately, the right of self-defense:

> "reflects a fundamental societal perception that in a situation where one person must die, it is preferable that the innocent party, the non-aggressor, survive." Note, "The Constitutionality of Affirmative Defenses After Patterson v. New York," 78 Col. L. Rev. 655, 672 (1978).[9]

Consequently, one may "save his own life by sacrificing the life of one who persists in endangering it." **Stoffer v. State**, 15 Ohio St. 47, 53 (1864). It was for reasons such as these that Sixth Circuit Judge Merritt has properly concluded that:

> ". . . the Constitution prohibits a state from eliminating the justification of self-defense from its criminal law, and requires the state to prove as an element of the crimes of assault and homicide that no such self-defense justification exists." **Isaac v. Engle**, 646 F.2d 1129, 1140 (6th Cir. 1980) (dissent), **rev'd on other grounds sub nom, Engle v. Isaac**, 456 U.S. 107 (1982).

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9. **See also** Wechsler & Michael, "A Rationale of the Law of Homicide," 37 Columbia L. Rev. 701, 736 (May 1937).

As stated by the Fourth Circuit:

> ". . . it is elementary and fundamental to our jurisprudence that killing or wounding in self-defense is simply no crime at all." **Sarah Thomas v. William D. Leeke**, 725 F.2d 246, 250, n. 2 (4th Cir. 1984), **cert. denied**, 469 U.S. ___, 105 S.Ct. 18, 83 L.E.2d 148 (1984).

Because self-defense is a constitutionally protected right, one exercising that right is engaged in innocent conduct. To require an accused to bear the burden of proof upon the issue of self-defense is to require the accused to prove her innocence in violation of the principles enunciated in **In re Winship**.

## II.

## PROOF OF SELF-DEFENSE NECESSARILY NEGATES SEVERAL INGREDIENTS OF THE CRIME OF AGGRAVATED MURDER.

### A. Mullaney and Patterson Analysis

Based upon **Patterson** and **Mullaney**, the analysis appropriate to this case is:

(1) identify the elements of the crime to be proven;

(2) consider whether the State of Ohio presumes any element of the crime charged;

(3) determine the relationship of affirmative defense to the crime charged; and

(4) determine if the affirmative defense negates any fact the State must prove.

The relevance of this analysis to the case **sub judice** is quite direct. Here, the Ohio Supreme Court essentially held that burdening the defendant with proving the defense of self-defense passes constitutional muster for the following reasons:

(1) the State was required to prove all of the statutory elements of the crime charged (purposely, prior calculation and design, causing death) [**State v. Martin**, 21 Ohio St.3d 91, 93, 488 N.E.2d 166, 168 (1986)];

(2) this Court's holding in **Patterson** did not require the State to disprove all affirmative defenses [**id.**, at 93];

(3) since self-defense contains facts which may be peculiarly within the defendant's knowledge, it would be too onerous to require the State to disprove those facts [**id.**, at 94]; and

(4) self-defense does not negate any elements of the offense with which Ms. Martin was charged [**id.**].

The first three grounds for the decision below are of little consequence. The mere fact that the jury is instructed that the State bears the burden of proof on all elements beyond a reasonable doubt merely brings the State in conformance with **In re Winship**. Thus, this factor simply states the obvious. Second, this Court has never held that labeling a defense as an affirmative defense allows the State to burden the defendant with proving that defense. Certainly, such a proposition would elevate form over substance, a proposition soundly rejected in **Mullaney v. Wilbur**, 421 U.S. at 699. This Court has never adopted a view of the law that would allow the use of labels to circumvent a functional analysis. Third, the characterization of self-defense as a defense peculiarly within the knowledge of the defendant cannot justify placing the burden

of proof on the defendant. That a fact may be within the knowledge of the defendant is insufficient to justify shifting the burden of proof to the defendant. **Mullaney v. Wilbur**, 421 U.S. at 702. Even though the State may be required thereby to prove a "negative" of a fact likewise is of no consequence. **Id.**, at 702, n. 31. The **Mullaney** Court soundly rejected this same rationale posited by the State of Maine:

> "No doubt this is often a heavy burden for the prosecution. The same may be said of the requirement of proof beyond a reasonable doubt of many controverted facts in a criminal trial. But this is the traditional burden which our system of criminal justice deems essential." **Id.**, at 701.

Since the first three rationales are of little significance, this Court should consider whether the Ohio Supreme Court was correct when it held that self-defense negates no elements of the crime of aggravated murder.

While this Court must initially look to the words of the statute in question to

determine whether self-defense negates any of its elements, this Court's decisions in **Mullaney** and **Patterson** also establish that the way in which those terms are interpreted by the courts of the state is of importance.

For example, in **Mullaney**, the defendant was charged with murder.[10] The defendant claimed first that he lacked the criminal intent necessary for the crime and second that the killing occurred in the "heat of passon," thereby reducing the crime to manslaughter. **Id.**, at 685. The defendant was burdened with proving that the killing occurred in the heat of passion on sudden provocation to mitigate the murder charge to manslaughter. **Id.**, at 687. **See also** Me. Rev. Stat. Ann. Tit. 17 § 2551 (1964). Had this Court only looked to the face of the

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10. Me. Rev. Stat. Ann. Tit. 17, § 2651 (1964); **Mullaney v. Wilbur**, 421 U.S. at 686, n. 3: "whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life."

Maine murder statute, "heat of passion" would have borne no relationship to any of the elements required to be proven. This Court, however, looked to Maine case law to determine a more accurate view of the criminal intent required for a murder conviction. In **State v. Lafferty**, 309 A.2d 647 (Me. 1973), the Maine Supreme Court held that malice aforethought was not an element of murder, disputing an interpretation of Maine law made by the Court of Appeals for the First Circuit in originally granting the Writ of Habeas Corpus. Rather, **Lafferty** held that a killing is unlawful and constitutes murder upon proof "of any deliberate, cruel act, committed by one person against another, suddenly without any, or without a considerable provocation." **State v. Lafferty**, 309 A.2d at 665.

Since absence of "heat of passion" was to be proven by the State, this Court held that the defendant could not be burdened with proving that factor. While proof of heat of

passion merely reduced the degree of culpability, the Court nonetheless held that the State could not burden the defendant with proving "heat of passion." In reaching this crucial result, the Court relied heavily upon the state court's interpretation of its own statutes.

A similar approach was taken in **Patterson** where the defendant was charged with murder in the second degree.[11] The defendant admitted the killing but defended on the ground that he killed during an extreme emotional disturbance. That defense mitigated the crime to manslaughter in the first degree. In finding that the defendant could be burdened with proving this defense, this Court looked to New York case law. Based upon that review, the Court held that "extreme emotional disturbance" did not "serve to

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11. New York Penal Law, § 125.25 (McKinney 1975); **Patterson v. New York**, 432 U.S. at 198, n. 2: "with intent to cause the death of another person, he caused the death of such person . . . ."

negative any facts of the crime which the State is to prove in order to convict of murder." **Id.**, at 207.

Under New York law, extreme emotional disturbance was defined as a "mental infirmity not arising to the level of insanity." **Patterson v. New York**, 432 U.S. at 206, **citing People v. Patterson**, 39 N.Y.2d 288, 302; 347 N.E.2d 898, 383 N.Y.S.2d 573, 582 (1976). Since this Court's prior decisions in **Leland v. Oregon**, 343 U.S. 790 (1952), and **Rivera v. Delaware**, 429 U.S. 877 (1976), unequivocally allowed the State to burden the defendant with proving insanity, New York did no more in **Patterson** than it was constitutionally permitted to do. This Court distinguished the result in **Patterson** from that in **Mullaney** primarily upon the way in which Maine had defined, in case law, the necessary elements of murder. Since, under Maine law, the absence of provocation was an element of the crime, the State could not

burden the defendant with proving that defense. An opposite result was reached in **Patterson** because under New York law, extreme emotional disturbance, both on the face of the statute and by judicial interpretation, bore no relationship to any of the elements charged.

Thus, **Mullaney** and **Patterson** indicate that this Court should consider not only the words contained in the homicide statute, but also the case law which gives definition and content to the proscribed offense. At the same time, both **Mullaney** and **Patterson** demonstrate that the ultimate conclusion as to whether a given defense necessarily negates an ingredient of the crime which the State is required to prove is a matter of federal law upon which this Court must exercise an independent judgment. As articulated by the Fourth Circuit:

> "The labels attached by the state legislature or supreme court are

> not dispositive . . . and the federal courts are to employ a 'functional analysis' aimed at determining whether the state has in effect incorporated the absence of the affirmative defense into the elements of the crime."[12]

Indeed, as this Court recognized in **McMillan v. Pennsylvania**, ___ U.S. ___, 54 U.S.L.W. 4709, 4711 (1986): ". . . in certain limited circumstances **Winship**'s reasonable doubt requirement applies to facts not formally identified as elements of the offense charged."

**B. Self-Defense Negates Unlawfulness**

By definition, an act must be "unlawful" in order to justify the imposition of criminal sanctions:

> "It should be conceded, as an axiomatic proposition that an

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12. **Cooper v. North Carolina**, 702 F.2d 481, 484 (4th Cir. 1983) [citations omitted]. **Accord: Adkins v. Bordenkircher**, 674 F.2d 279, 282 n. 6 (4th Cir. 1982). **See also Lamb v. Jernigan**, 683 F.2d 1332, 1335-1336 (11th Cir. 1982), and **Holloway v. McElroy**, 632 F.2d 605, 625, 628 (4th Cir. 1980), **cert. denied**, 451 U.S. 1028 (1981).

> indictment or information must, in some manner, charge the unlawfulness of the defendant's conduct." Anno., 169 A.L.R. 166 (1947).

Thus, the mere allegation that a crime has been committed is an allegation of unlawfulness.

Historically, criminal homicide has been defined as the "unlawful killing of a human being . . ." I Warren on Homicide, § 54, p. 163 (1914). **See also** §§ 63, 64 and 68.

A review of Ohio law demonstrates that the element of "unlawfulness" has never appeared in the Ohio first-degree murder

statute.[13] Yet, Ohio cases have consistently required proof of unlawfulness in order to

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13. Prior to 1880, the statute read as follows:

> "That if any person shall purposely, and of deliberate and premeditated malice, or in the perpetration or attempt to perpetrate any rape, arson, robbery or burglary, . . . or by administering poison or causing the same to be done, kill another . . . ." Revised Statutes of 1854, 269; **State v. Farmer**, 156 Ohio St. 214, 218, 102 N.E.2d 11, 14 (1951); **see also Robbins v. State**, 8 Ohio St. 131, 175 (1857).

The statute was changed in 1880:

> "Whoever, purposely and either of deliberate and premeditated malice, or by means of poison, or in perpetrating or attempting to perpetrate rape, arson, robbery or burglary, kills another . . . ." **See** General Code § 12400.

The statute was next changed in 1953:

> "No person shall purposely, and either of deliberate and premeditated malice, or by means of poison or in perpetrating or attempting to perpetrate rape, arson, robbery, or burglary, kill another." R.C. § 2901.01 (Page's 1953), Ohio Revised Code.

The statute reached its present state in 1974, where two elements (deliberate and premeditated malice) were replaced and the so-called "felony murder" aspect was given its own subsection:

> "(A) No person shall purposely, and with prior calculation and design, cause the

establish the crime of murder.[14]

From the above, it is evident this

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(cont.)

death of another.

> "(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary or escape." Ohio Revised Code § 2903.01 (Page's 1974).

Ms. Martin was charged with violating R.C. § 2903.01(A).

14. In **Ohio v. Brooks**, 1 Ohio Dec. Reprint 407 (Cuy. Co. Common Pleas 1851), the court instructed the jury as follows in a case of first-degree murder:

> "[First], murder in the first degree, which in general is an unlawful killing purposely and of premeditated malice." **Id.** at 407 (emphasis added).

For a civil case that defines murder as an unlawful killing, **see Filmore v. Insurance Co.**, 82 Ohio St. 208, 214, 92 N.E. 26 (1910).

Likewise, Ohio courts have held:

> "The defendant in a homicide case cannot be required to establish his defense of self-defense until the State has established that the killing by him was an unlawful killing . . ." **Taylor v. State**,

judicial element of unlawfulness co-existed with the element of malice. Prior to 1974, when the element of malice existed, reviewing courts consistently interpreted the two terms differently and interpreted each to be required. Thus, the presence or absence of "malice" in the relevant statute has no effect on the requirement of "unlawfulness." The

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(cont.)

> 21 Ohio C.C. Dec. 602, syllabus 2 (1909) (emphasis added). **See also Wray v. State**, 5 Ohio C.C. (N.S.) 437, 442 (1904) (emphasis added).
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> "Murder in the first degree, he said, is the intentional unlawful killing, by one reasonable being of another, in the peace of the state, of deliberate and premeditated malice" (emphasis added). **State v. James Turner**, Wright (Ohio Supreme Court Decisions) 20, 27 (1831), **questioned Fuller v. State**, 12 Ohio St. 431, 436 (1861).
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> "If the 'intent to kill,' under all the circumstances of the transaction was justifiable and lawful, for example, if in lawful self-defense, the legislature could not be held reasonably to intend to declare it an offense. It is only where the intent to kill was unlawful and wrongful that it should be held to constitute a crime . . . ." **State v. Stout**, 49 Ohio St. 270, 283-284, 30 N.E. 437, 440 (1892) (emphasis added).

unlawfulness of the criminal act must always be proven. Ohio courts have likewise held that all Ohio citizens have a right to self-defense which, if established, is a lawful justifiable act.[15]

Furthermore, the Ohio Constitution requires that all indictments allege that the offense in question was against the "peace and dignity of the State of Ohio." Article IV, § 20, Ohio Constitution.[16] This is not a mere matter of form but rather a "clear allegation that the acts done were unlawful." **Hamilton v. Alvis**, 109 Ohio App. 298, 301, 160 N.E.2d 372, 374 (1959). The purpose of the requirement was to provide:

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15. **Marts v. State**, 26 Ohio St. 162, syllabus 2 (1875); **State v. Champion**, 109 Ohio St. 281, 284, 142 N.E. 141, 142 (1924); **see also Graham v. State of Ohio**, 98 Ohio St. 77, 81-82, 120 N.E. 232, 233 (1918) ["lawful right of self-defense"]; **State v. Vancak**, 90 Ohio St. 211, 214, 107 N.E. 511, 512 (1914); **Stoffer v. State**, 15 Ohio St. at 51-52.

16. **See also** R.C. § 2941.06 and R.C. § 2941.10 (the fact of the indictment constitutes an allegation that no legal excuse exists for the act).

> "[A] sufficient and uniform conclusion to the allegations of fact constituting the charge." **State v. Stapely**, 19 Ohio Dec. 110, 111 (Hamilton Cty. Common Pleas Ct. 1908) (emphasis added). **See also State v. Nieto**, 101 Ohio St. 409, 428, 130 N.E. 663, 668 (1920) (Wanamaker, J., dissenting on other grounds).

In the case at bar, the indictment against Petitioner Martin contains the specific allegation that her conduct was "unlawful" and against the "Peace and Dignity of the State of Ohio" (A. 23).

The instructions given in the case at bar paralleled this common-law view and required the jury to find that:

> "the defendant unlawfully and purposely and with prior calculation and design, caused the death of another . . ." (emphasis added) (Transcript at 686, A. 13).

Thus, the State must necessarily admit that it was required to prove, beyond a reasonable doubt, that the accused's conduct was unlawful.

The relevant question, then, becomes whether self-defense is inconsistent with

unlawful conduct. The case law of Ohio uniformly recognizes that proof of self-defense is proof of innocence and hence inconsistent with guilt. **E.g., Silvus v. State**, 22 Ohio St. 90 (1871), **cited with approval in State v. Humphries**, 51 Ohio St. 2d 95, 98, 364 N.E.2d 1354, 1357 (1977).[17]

In his dissent, Judge Jackson of the Eighth District Court of Appeals indicated that: "Historically, self-defense has been considered to negate the unlawfulness element" (A. 16) (citations omitted). As Justice

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17. In English common law, a distinction was made between justifiable and excusable homicide. Blackstone, Commentaries on the Laws of England 177-178 (1783). Justifiable homicide carried no penalties, while excusable homicides resulted in the forfeiture of the slayer's lands. The concept of forfeiture, being foreign to American law, was discarded and the distinction between justifiable and excusable self-defense, however slight originally, disappeared. I Bishop, A Treatise on Criminal Law, § 865, 2, p. 614 (9th ed. 1982); II Bishop, **supra**, § 617, 2, p. 471; **Erwin v. State**, 29 Ohio St. 186 (1876). Under Ohio law, all actions taken in self-defense are justifiable, lawful acts done without criminal intent. **E.g., Erwin v. State, supra**, at 194-199. **See also** LaFave & Scott, Handbook on Criminal Law, § 53 at 391 (1972).

Clifford F. Brown, of the Ohio Supreme Court, noted in his dissent:

> "For more than a century, self-defense has been considered to negate the element of unlawfulness which must be present in order to convict a defendant of aggravated murder." **State v. Martin**, 21 Ohio St.3d 91, 93, 488 N.E.2d 166, 171 (1986) (citations omitted) (A. 45).

The decisions of other state and federal courts considering this issue have consistently found self-defense to be inconsistent with unlawfulness.[18]

> "Self defense annihilates unlawfulness and malice and consequently absence of it must be proven by the prosecution beyond a reasonable doubt." **Griffin v. Martin** 785 F.2d at 1182 (Murnaghan, J.) (pending following rehearing

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18. **E.g., McElroy v. Holloway**, 632 F.2d 605 (5th Cir. 1980), **cert. denied**, 451 U.S. 1028, (1981); **State v. Hankerson**, 288 N.C. 632, 220 S.E.2d 575 (1975), **rev'd on other grounds sub nom. Hankerson v. North Carolina**, 432 U.S. 233 (1977); **Commonwealth v. Hilbert**, 476 Pa. 288, 300, 382 A.2d 724, 731 (Pa. 1978). **See also** cases outlined in the Appendix to this Brief at A-1.

**en banc**).[19]

Indeed, the jury instructions in this very case inferentially indicated the inconsistency: if the accused was found to have acted in self-defense, then no crime was committed and a verdict of not guilty was to be returned.

In Ohio Revised Code § 2901.05(A), Ohio has adopted its common-law rule requiring an accused to bear the burden of proving a claim of self-defense. This rule was justified by Ohio courts at common law, however, because every killing was presumed to be unlawful. **See Silvus v. State**, 22 Ohio St. 90 (1871); **State v. Robinson**, 161 Ohio St. 213 (1954); **State v. Kinnemore**, 34 Ohio App.2d 39 (1972).

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19. **See also White v. Arn**, 788 F.2d 338, 347, n. 14 (6th Cir. 1986) (Petition for Writ of Certiorari pending):

> "[i]f unlawfulness were a statutory element of crimes in Ohio, then self-defense would negate the element and consequently the burden of proof could not be placed upon the accused" (emphasis added).

This common-law presumption of unlawfulness is still a part of Ohio law. This is evident from the Ohio Supreme Court's decision in this case. The Court characterized the affirmative defense of self-defense as a "justification for admitted conduct" which "seeks to relieve the defendant from culpability rather than negate an element of the offense charged." **Martin**, 21 Ohio St.2d at 94. **See also Thomas v. Arn**, 704 F.2d 865, 877 (6th Cir. 1983).[20]

Thus, under Ohio law, unlawfulness (i.e., a crime) is to be presumed from proof of the elements of the offense, despite the fact that the accused may have acted in self-defense. In other words, a lawful act of self-defense is presumed to be unlawful unless

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20. "[Ohio Revised Code § 2901.05(C)(2)'s] use of the terms 'excuse' and 'justification' strongly implies that a criminal offense has been committed--i.e., that all elements of a crime have been proven beyond a reasonable doubt and that the perpetrator will be criminally liable unless an 'excuse' or 'justification' is presented." **But see** fn. 17, **supra**.

the accused establishes his innocence. **See** Note, "H. B. 1168: The Burden of Proving An Affirmative Defense," 5 U. Dayton L. Rev. 441, 458 (1980).

At the same time, Ohio's high court refuses to acknowledge that self-defense is inconsistent with the fact that a crime (unlawfulness) has occurred. **See State v. Martin**, 21 Ohio St.3d at 94 ("The elements of the crime and the existence of self-defense are separate issues"). Indeed, a plea of self-defense plainly denies, rather than admits, that a crime has occurred.

**Amicus** submits that the State of Ohio cannot have it both ways. Either self-defense negates the elements of the crime (i.e., unlawfulness), as it did at common law, or it does not. If it does, the State's burden is clear. **See Patterson v. New York**, 432 U.S. 197 (1977). If it does not, then the State should not get the benefit of the common-law presumption of unlawfulness (i.e., that

a crime has been committed) from the fact that a killing has occurred; and thereby shift the burden of proof to the accused to prove otherwise. **See Patterson**, 432 U.S. at 215;[21] **accord, Mullaney v. Wilbur**, 421 U.S. 684 (1975).[22]

Moreover, Ohio's utilization of this presumption of unlawfulness violates traditional due process requirements for presumptions. It satisfies neither the rational connection test, i.e., the presumed fact must more likely than not flow from the proven fact, **Leary v. United States**, 395 U.S. 6, 36 (1969); or the beyond a reasonable doubt test, i.e., proven fact must be sufficient to support inference of presumed fact beyond a reasonable doubt, **Barnes v. United States**,

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21. "[The State] may not shift burden of proof to the defendant by presuming [an] ingredient of the offense upon proof of the other elements [of the offense]."

22. Presumption of malice from proof of an unlawful and intentional killing, unless accused proved he acted in heat of passion, is unconstitutional.

412 U.S. 837, 843 (1973).[23] See **Mullaney**, 421 U.S. at 702, n. 31. There is simply no basis in either logic or experience to infer that an accused acted unlawfully from mere proof of a killing. **See** Model Penal Code, Comment to Section 1.13 (Tent. Draft No. 4, 1955) ("No one can estimate the probability" that "an intentional homicide . . . was or was not committed in self-defense"). Therefore, Ohio's continued reliance upon this common-law presumption of unlawfulness to shift the burden to the accused to prove her act lawful violates due process.

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23. **Amicus** submits that Ohio's presumption of unlawfulness must satisfy the beyond a reasonable doubt test as it is a mandatory presumption. **See Francis v. Franklin**, 471 U.S. ___, 85 L.Ed.2d 344, 353 (1985) (mandatory presumption is one jury must infer if state proves certain predicate facts); **accord, Sandstrom v. Montana**, 442 U.S. 510 (1979). Ohio's presumption of unlawfulness is mandatory because it is established upon proof of the elements of the offense even though the defendant may have acted lawfully in self-defense.

C. **Self-Defense Negates Criminal Conduct**

It is axiomatic that the State can only punish criminal conduct. **E.g., Robinson v. California**, 370 U.S. 660 (1962); **Powell v. Texas**, 392 U.S. 514 (1968). It has been held since the 1600s that killing another in self-defense is conduct which is justified--no crime has been committed. **Mullaney v. Wilbur**, 421 U.S. at 692. This has always been the law in Ohio. **E.g., Marts v. State**, 26 Ohio St. 162 (1875) (Syllabus 2), **cited with approval, State v. Melchior**, 56 Ohio St.2d 15, 21, 381 N.E.2d 195, 199 (1978).

The State of Ohio recognized this requirement and made allegations of criminal or unlawful conduct against Petitioner Martin. Like alibi, **e.g., Stump v. Bennett**, 398 F.2d 111 (8th Cir. 1978), **cert. denied**, 393 U.S. 1001 (1968); **Johnson v. Bennett**, 393 U.S. 253 (1968), and even more so than by accident, **e.g., State v. Rivers**, 50 Ohio App.2d 129, 134, 361 N.E.2d 1363, 1367 (1977),

self-defense establishes that the accused committed no crime at all. **Marts v. State,** 26 Ohio St. 162 (1875).

> "Killing . . . by one acting in self defense against an attack by another is not a crime." **State v. Jones**, 47 Ohio App.2d 8, 14; 351 N.E.2d 798, 803 (1975).

**Accord, State v. Clifton**, 32 Ohio App.2d 284, 290 N.E.2d 921, 922-23 (1972).

Even under the erroneous preponderance standard, if the jury "finds" self-defense, there "must be an entire acquittal . . . ." **Erwin v. State** 29 Ohio St. at 199.

In **Mullaney**, it was found to be constitutional error to require the accused to prove a fact which negated only a single element of the crime and which made a difference only as to the seriousness of the offense of which the accused was guilty. **Mullaney** should apply to the case at bar **a fortiori**, where proof of self-defense would negate the entire crime and establish complete innocence.

## D. Self-Defense Negates the Voluntary Act Requirement

The voluntary act element set forth in R.C. § 2901.21(A) is defined by exception. R.C. § 2901.21(C)(2) provides that:

> "Reflexes, convulsions, body movements during unconsciousness or sleep, and body movements that are not otherwise a product of the actor's volition, are involuntary acts.

A claim of self-defense negates the voluntary act element. Acts while defending one's self are not a product of the actor's volition. The reaction to an unlawful attack may very well be reflexive. Surely, "detached reflection cannot be demanded in the presence of an uplifted knife," **Brown v. United States**, 256 U.S. 335, 343 (1921), and the urge for self-preservation in the face of imminent peril may supersede any capacity of the besieged victim to control her actions. This is so because actions taken in self-defense are based upon "the 'instinct' for self-preservation and arise 'spontaneously.'"

**Stoffer v. State**, 15 Ohio St. at 52-53. In this sense Ms. Martin's conduct was not "willed," Holmes, The Common Law 54 (1881), and cannot be considered a completely voluntary act within the meaning of Ohio's statutory requirement.

This was the exact conclusion reached by the Ohio Court of Appeals in **State v. Hardy**, 60 Ohio App.2d at 329; 397 N.E.2d at 776 (1978):

> "A legitimate act of self defense is much more a mere reflex action than one committed voluntarily" (emphasis added).

**E. Self-Defense Negates Both General Intent and the Specific Intent of Prior Calculation and Design.**

1. **General Intent.** For crimes which are considered **mala in se**, it is generally recognized that the state must prove both **mens rea** and **actus reus**. **See generally Lambert v. California**, 355 U.S. 285 (1975), and **Powell v. Texas**, 392 U.S. 514 (1968).

> "Criminal liability is normally based upon the concurrence of two

> factors, 'an evil-meaning mind [and] an evil-doing hand . . . .'" **United States v. Bailey**, 444 U.S. 394, 402 (1980), **quoting Morissette v. United States**, 342 U.S. 246, 251 (1951).

Or, in the words of Justice Holmes, criminal liability is founded on "blameworthiness." Holmes, The Common Law 50 (1881).[24]

The Legislature of the State of Ohio required proof of general **mens rea**, for the Legislative Committee Note to R.C. § 2901.22 states that for conviction there must be a "blame-worthy" mental state--a "guilty state of mind." Similarly, the Committee Comment to Ohio Revised Code § 2901 states that an essential part of any crime must be "a certain guilty state of mind at the time of his act or failure."

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24. "[T]o constitute a crime against human laws, there must be first a vicious will, and second, an unlawful act consequent upon such vicious will." 4 Blackstone, Commentaries on the Laws of England, Ch. 21, p. 289 (1783), **quoted with approval**, 27 Ohio Jur. 2d, Homicide, § 6, pp. 557-8 (1957). **See also State v. Carson**, 2 Ohio Dec. Reprint 81, 82 (Hardin Cty. C.P., 1859): "Guilty knowledge is generally, and criminal intent always, necessary to constitute

A person who acts in lawful self-defense cannot be said to have a state of mind which is either "blame-worthy" or "guilty." On the contrary, proof of self-defense would disprove the existence of such a state of mind. For example, in **State v. Clifton**, 32 Ohio App.2d at 286, 287; 290 N.E.2d at 923, the Court concluded that: "Clearly, one who kills in self-defense does so without the **mens rea** that otherwise would render him culpable of the homicide."

Judge Whiteside, of the Ohio Court of Appeals, has found that:

> ". . . the existence or nonexistence of self-defense bears a direct relationship to the existence or nonexistence of the required mental elements of the crime [of aggravated murder]. **State v. Robinson**, 48 Ohio App.2d 197, 206, 209; 356 N.E.2d 725, 721 (1975) (Whiteside, concurring), **affirmed on other grounds**, 47 Ohio St. 103, 351 N.E.2d 88 (1976).

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(cont.)

crime" [jury charge].

As Justice Sweeney noted in his dissent below: "The affirmative defense of self-defense . . . goes to the **mens rea** of the crime charged, whether the act committed was indeed a criminal act." **State v. Martin**, 21 Ohio St.3d at 96 (A. 43-44).

Applying similar reasoning, former Chief Judge Edwards of the Sixth Circuit found:

> "Criminal intent of aggravated assault and self-defense are, in my view, completely irreconcilable. To require a defendant to carry the burden of proof on self-defense is to require him to disprove criminal intent" (footnote omitted). **Isaac v. Engle**, 646 F.2d at 1136.

Proof of self-defense negates the mental element of the crime of aggravated murder. Burdening Ms. Martin with proving self-defense deprived her of her Fourteenth Amendment right to require the state to prove her guilt beyond a reasonable doubt.

**2. Prior Calculation and Design.** Petitioner Martin was convicted of aggravated murder, under R.C. § 2903.01. A critical

element of this offense is "prior calculation and design." Saddling the Defendant with the burden of proving self-defense relieved the State of its constitutionally mandated burden of proving this element. The conflict between the two is irreconcilable.

The Ohio Supreme Court has interpreted the elements of "prior calculation and design" to require greater thought and control on the part of the defendant than the previously utilized elements of "premeditation and deliberation."

> "Instantaneous deliberation is not sufficient to constitute prior calculation and design."
>
> "Where evidence adduced at trial reveals the presence of sufficient time and opportunity for the planning of an act of homicide to constitute prior calculation, and the circumstances surrounding the homicide show a scheme designed to implement the calculated decision to kill, a finding by the trier of fact of prior calculation and design is justified." **State v. Cotton**, 56 Ohio St.2d 8, ¶¶ 2 and

3 of the Syllabus; 381 N.E.2d 186 (1978).[25]

Thus, under Ohio law, if the Petitioner acted solely upon the instantaneous decision to preserve her own life, that fact would negate the element of "prior calculation and design." This dichotomy between self-defense and prior calculation and design was aptly demonstrated by the jury instructions below.

The trial court instructed the jury that prior calculation and design cannot be found when a defendant "acts on the spur of the moment or after momentary consideration of the purpose to kill" (T. 690; A. 14), yet self-defense demands "an honest belief . . . in imminent danger of death or serious bodily harm" (T. 700; A. 19), a belief that the defendant is about to be killed or to receive

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25. **See also** Legislative Service Commission Note to R.C. § 2903.01 (1973).

great bodily harm" (T. 701; A. 20).[26] Only acts to escape an imminent threat of death or serious bodily harm can be grounds for acquittal. If the imminence of the threat dissipates, and the defendant is "released from the danger, . . . the right to use force in self-defense [is] ended" (T. 702; A. 21). Self-defense thus cannot co-exist with prior calculation and design.

> "Acting on the spur of the moment or after momentary consideration of the purpose to kill is not sufficient to constitute the kind of prior calculation and design required for aggravated murder." (T. 690-691; A. 14)

A killing resulting from an instantaneous eruption of events "is not one with prior calculation." **State v. Robbins**, 58 Ohio St.2d

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26. "Imminent danger" in this context is further defined in Black's Law Dictionary (Rev. Fourth Ed. 1968), as "immediate danger, such as must be instantly met, such as cannot be guarded against by calling for the assistance of others or the protection of the law. Or, . . . such an appearance of threatened and impending injury as would put a reasonable and prudent man to his instant defense" (emphasis added).

74, 78 (1979).[27] Yet, an act in self-defense necessarily occurs on the spur of the moment, arising spontaneously in the face of an imminent danger. **Stoffer v. State**, 14 Ohio St. at 52-53. It is an instantaneous eruption of events, presenting no opportunity to avoid the danger. **State v. Robbins**, 58 Ohio St.2d at 80. The force used by the defender is "immediately necessary for the purpose of protecting [her]self." Model Penal Code § 3.04, p. 478 (1974) (emphasis added).

To prove the element of prior calculation and design, the prosecution necessarily must demonstrate that the defendant's act was not on the spur of the moment (T. 690; A. 14).

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27. The trial court further instructed the jury that prior calculation and design requires "a definite process of reasoning in advance of the killing, which . . . must have included a mental plan, involving studied consideration of the method and the means with which to kill another." (T. 690; A. 14) **See also** Legislative Service Commission Note to R.C. § 2903.01 (1983), requiring "studied care in planning or analyzing the means of the crime, as well as a scheme encompassing the death of the victim" (emphasis added). Prior calculation and design is wholly incompatible with self-defense.

By obliging the defendant to prove she acted in the belief that she was "in imminent danger," about to be killed or to receive great bodily harm (T. 701; A. 20), the Ohio trial court demanded that Earline Martin prove she acted on the spur of the moment. The trial court's instruction thus required her to disprove the essential element of prior calculation and design, and her conviction is violative of due process.

The Ohio Supreme Court stated that Appellant did not dispute the existence of these elements, including prior calculation and design. This is inaccurate. In fact, the Ohio Supreme Court did not independently analyze the relationship between self-defense and the elements of offenses.

The Ohio Supreme Court instead attempted to rely on the characterization of self-defense in **State v. Poole**, 33 Ohio St.2d 18, 19, 294 N.E.2d 888, 889 (1973), as a defense

which "admits the facts claimed by the prosecution." Such reliance is misplaced. **Poole** involved the defense of accident, not self-defense, to a charge of the first degree under the previous murder statute, and simply identified self-defense as such a defense in passing. **State v. Poole**, 33 Ohio St.2d at 19, n. 3. More importantly, all of the cases which **Poole** cited in support of this characterization, and **Poole** itself, were decided before the element of prior calculation and design was legislatively identified and defined. Therefore, **Poole** has no relevance in the determination of the relationship between self-defense and prior calculation and design.

Petitioner Martin is not asking this Court to substitute its own reading of the term 'prior calculation and design' for that of the Ohio legislature or the Ohio courts. The meaning of the term is evident in both the Legislative Service Committee notes and

Ohio decisions. The inconsistency between "prior calculation and design" and self-defense is evident upon the face of the jury instructions in the case at bar. Since prior calculation and design and self-defense so obviously negate one another, the principles of **Mullaney** and **Patterson** require that the judgment of the Ohio Supreme Court be reversed.

**Sandstrom v. Montana**, 442 U.S. 510 (1979), and **Francis v. Franklin**, 471 U.S. ___, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), also warrant a reversal of Defendant Martin's conviction. "A jury's verdict cannot stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof." **Cabana v. Bullock**, ___ U.S. ___, 106 S.Ct. 696, 88 L.Ed.2d 704, 715 (1986) (citing **Sandstrom**).

While the jury received general instructions as to the prosecutor's burden (T. 676, 686-7, 692-693; A. 6, 12, 15), and

the presumption of innocence (T. 676-677; A. 6-7), the jury was also specifically instructed that the burden of proof is upon the Defendant to prove the elements of self-defense by a preponderance of the evidence (T. 699-700, 703; A. 19-20, 21). Prior calculation and design and self-defense are simply irreconcilable circumstances. Ms. Martin's jury was thus faced with clearly contradictory instructions respecting allocation of the burden of persuasion on a crucial element of the offense, prior calculation and design. Such "contradictory instructions as to [an element] create a reasonable likelihood that a juror understood the instructions in an unconstitutional manner," **Francis v. Franklin**, 105 S.Ct. at 1976, shifting the burden of proof from the prosecution to

Defendant Martin.[28]

Informing the jury at several points

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28. While **Sandstrom** and **Francis** both presented instances of unconstitutional burden-shifting by means of a presumption, the same due process test of "the way in which a reasonable juror could have interpreted the instruction" **Sandstrom v. Montana**, 442 U.S. at 514, must apply to jury instructions which, by other devices, are challenged as having the effect of relieving the state of the burden of proof enunciated in **Winship**. This test applies regardless of the device used. "It has been settled law since **Stromberg v. California**, 283 U.S. 359 (1931), that when there exists a reasonable possibility that the jury relied on an unconstitutional understanding of the law in reaching a guilty verdict, that verdict must be set aside." **Francis v. Franklin**, 105 S.Ct. at 1976, n. 8. The **Stromberg** principle clearly applies to other burden-shifting devices, although the Court has not yet had an occasion to apply it in a non-presumption context. The issue was presented in **Patterson**. Although this Court concluded its opinion with the statement that "nothing was presumed or implied against Patterson," **Patterson v. New York**, 432 U.S. at 216, this Court had granted review in the absence of a presumptive device to consider whether "burdening the defendant in a New York State murder trial with proving the affirmative defense of extreme emotional disturbance as defined by New York law" offended the constitution. **Patterson v. New York**, 432 U.S. at 198. The Court sustained Patterson's conviction as no burden-shifting occurred as to an element of the crime because the affirmative defense bore no direct relationship to any element of murder. **Patterson v. New York**, 432 U.S. at 201.

The Court's recent opinion in **Cabana v. Bullock**, ___ U.S. ___, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986), demonstrates the Court's continued application of the **Stromberg** test to all circumstances where jurors may have been led to unconstitutional, or constitu

that the prosecutor must prove prior calculation and design beyond a reasonable doubt does not cure the due process violation. These instructions at best contradicted the allocation to the defendant of the burden of proof on self-defense. **See Francis v. Franklin**, 105 S.Ct. at 1975, 1976, and **see also Cabana v. Bullock** at 714-715, n. 2. No instructions were provided the jury that would lead them to reconcile the conflicting instructions in a constitutionally permissible manner.

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(cont.)

tionally inadequate, decision-making. In **Bullock**, the Court used the **Stromberg** test in ascertaining whether the capitally sentenced Bullock had been found by the jury to have actually killed, attempted to kill or possessed the intent to kill the victim as required by the Eighth Amendment. **See Enmund v. Florida**, 458 U.S. 782 (1982). The Court found that a "fair-minded juror . . . could have understood [the jury instructions] to mean that the jury could find Bullock guilty of capital murder without regard to his intent." **Cabana v. Bullock**, 88 L.Ed. 2d at 714. **Bullock** involved no presumptions, nor burden-shifting, yet the Court applied the **Stromberg** analysis. That same analysis should apply here to a non-presumptive, but burden-shifting, instruction.

The burden-shifting was repetitive and permeated the entire charge. The conflict was inherent throughout the instructions. While the jurors were told to resolve inferences equally consistent with guilt or innocence in favor of the Defendant (T. 681; A. 8), they were at the same time specifically told to convict if the evidence regarding self-defense was in equipoise (T. 703-704; A. 21). On these instructions, the jurors were informed that the state had the burden to prove prior calculation and design beyond a reasonable doubt but what the jurors were not explicitly told was that self-defense could provide that reasonable doubt. Indeed, a reasonable juror may well have believed that Earline Martin had to prove the absence of prior calculation and design by a

preponderance of the evidence to be acquitted.[29]

Finally, the instructions created confusion by yet another conflicting duty. The jurors were instructed: "Before you can find the Defendant guilty of aggravated murder, you must find beyond a reasonable that on or about the 21st day of July, 1983, and in Cuyahoga County, Ohio, the Defendant unlawfully and purposely and with prior

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29. The jurors received a written copy of the instructions (T. 686; A. 11), and therefore had the opportunity to review them. It is possible that some jurors may have disagreed with the judge's instructions that the Defendant must prove her innocence, i.e., that her act was in self-defense. However, it is highly unlikely that such disagreement would have influenced deliberations. The first instruction the jury received was that it was their sworn duty to apply the law as given, and that they "are not permitted to change the law, not to apply your own ideas of what you think the law ought to be" (T. 673; A. 4). One of the last instructions the jury received was that they "not invad[e] [the judge's] area, which is relative to the law (T. 705; A. 22). The jury was also repeatedly admonished not to be "swayed or influenced by considerations such as sympathy" (T. 673; A. 4-5, and see 704; A. 22). Therefore, even if some jurors were possibly unhappy with the law's allocation of burden, they were not permitted the opportunity to act on those concerns.

calculation and design, caused the death of another . . ." (emphasis added) (T. 686; A. 12). The jury was told there was a right of self-defense (T. 702; A. 20-21) and that an act performed in self-defense is "justified" (T. 699, 700; A. 19, 20).

Therefore, the jurors were directed that the prosecution must prove that her act was unlawful, and yet Ms. Martin had to prove her act was justified, i.e., lawful. These instructions are irreconcilable, and a reasonable juror might well reconcile the two by placing the burden of proof on the Defendant to prove her act lawful. This interpretation offends due process, and this Court cannot, on this record, be assured this path was not taken.

## III.

**DUE PROCESS REQUIRES THAT THE STATE BEAR THE BURDEN OF PROVING BEYOND A REASONABLE DOUBT THAT THE ACCUSED'S ACTIONS WERE UNLAWFUL AND NOT IN SELF-DEFENSE.**

It is axiomatic that the State may not convict and punish an accused for a crime unless it has proved his guilt beyond a reasonable doubt. **In re Winship**, 397 U.S. 358 (1970). This fundamental due process standard was not met in the instant case. The State was not required to prove that Ms. Martin's actions were unlawful and constituted a crime. On the contrary, Ms. Martin was required to prove that she acted lawfully in self-defense.

In **Winship**, 397 U.S. at 363-364, this Court identified several vital interests protected by the reasonable doubt standard: the liberty and good name of the accused; reducing the risk of convictions based on factual error; and commanding the respect and confidence of the community in applications of the

criminal law. As in **Mullaney v. Wilbur**, 421 U.S. at 700, these interests are implicated to a greater degree here. Ms. Martin faced a life sentence and stigmatization as a murderer if convicted. If acquitted, she would be set free. Both the consequences to Ms. Martin and the community's interest in seeing only the guilty punished required that the State prove that she acted unlawfully.

Moreover, requiring Ms. Martin to prove the critical fact in dispute--whether or not she acted in self-defense--increased the likelihood of an erroneous conviction. **Id.**, at 701. This Court held in **Mullaney** that:

> "[s]uch a result contravenes the principle articulated in **Speiser v. Randall**, 357 U.S. 513, 525-526 (1958):"
>
> > '[w]here one party has at stake an interest of transcending value--as a criminal defendant his liberty--th[e] margin of error is reduced as to him by the process of placing on the [prosecution] the burden . . . of persuading the factfinder at the conclusion of the trial . . ." **See also In re Winship**,

397 U.S. at 370-372 (Harlan, J., concurring). **Id.**

**See also, Patterson,** 432 U.S. at 215.[30] Accordingly, due process requires the State to bear the ultimate burden of persuasion on the issue of self-defense, a fact so critical to culpability.

The practical effect of requiring an accused to prove self-defense by a preponderance of evidence is appalling. Under this burden of proof, Ms. Martin could have received a life sentence when it was as likely as not that she was innocent. As this Court recognized in **Mullaney,** 421 U.S. at 703, this is an intolerable result in a society where "it is far worse to convict an innocent man than to let a guilty man go free." **See Winship,** 397 U.S. at 372 (Harlan, J., concurring). It can only be remedied by requiring

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30. "Such shifting of the burden of persuasion with respect to a fact which the state deems so important that it must be either proved or presumed is impermissible under the Due Process Clause."

the State to prove beyond a reasonable doubt that the accused did not act in self-defense. Otherwise, guilt may be found even where there is a reasonable doubt that the defendant's actions were criminal.

Additionally, under Ohio law a jury must decide guilt or innocence based on conflicting and confusing instructions. On the one hand, the jury is told the accused is presumed innocent and the State must prove guilt beyond a reasonable doubt. On the other, the jury is instructed that the defendant is required to prove his claim of self-defense by a preponderance of the evidence. While lawyers may reconcile those instructions, there is

substantial doubt that lay jurors can.[31] Due process demands that the jury clearly understand the proper standard of proof for deciding guilt or innocence. **Sandstrom v. Montana**, 442 U.S. 510 (1979); **Francis v. Franklin**, 471 U.S. ___, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); **Cabana v. Bullock**, 474 U.S. ___, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986). Indeed, the overwhelming number of jurisdictions in the United States have recognized this fact and require the state to bear the burden of proof upon the issue of self-defense. **See** cases summarized in the Appendix

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31. **See** Comment, "Shifting the Burden of Proving Self-Defense--With Analysis of Related Ohio Law," 11 Akron L. Rev. 717, 744 (1978). Several courts have held similar instructions placing the burden of proof on the issue of self-defense on the defendant to be conflicting and confusing. **See Thomas v. Leeke**, 725 F.2d 246 (4th Cir. 1984), **cert. denied**, 469 U.S. ___, 105 S.Ct. 218 (1984); **Griffin v. Martin**, 785 F.2d 1172 (4th Cir. 1986), **reh. en banc granted**, ___ F.2d ___; **State v. Millet**, 273 A.2d 504 (Maine 1971), and cases cited therein; **Leonard v. People**, 369 P.2d 54 (Colorado 1962); **Lester v. State**, 121 So.2d 110 (Alabama 1960); **see also Cherry v. Jago**, 722 F.2d 1296 (6th Cir. 1983) (Jones, J., dissenting) **cert. denied**, ___ U.S. ___, 104 S.Ct. 3518 (1984).

to this brief at A-4. Placing the burden on the State to prove the absence of self-defense has the virtue of relative simplicity and comports with **Winship**. **See State v. Millet**, 273 A.2d at 507.

If this Court is to remain true to the principles of **Winship**, it cannot countenance the conviction in this case under a lesser standard of proof. The State cannot be permitted to deprive the accused of her liberty and good name without being required to prove that her actions were unlawful. Actions taken in self-defense are not a crime. Before the State may punish an accused, she must be shown to be morally blameworthy. **See** Fletcher, "Two Kinds of Legal Rules: A Comparative Study of Burden of Persuasion Practices in Criminal Cases," 77 Yale L.J. 880, at 890, 911 (1968). This is fundamental to basic notions of due process.

Further, to require the accused to prove her innocence on the "critical fact in

dispute" compounds the **Winship** violation. It not only conflicts with the overriding presumption of innocence, but increases the risk that an innocent person will be convicted. **Mullaney v. Wilbur**, 421 U.S. at 701. It is certainly not a standard of proof "designed to exclude as nearly as possible the likelihood of an erroneous judgment." **Addington v. Texas**, 441 U.S. 418, 423 (1979). As this court said in **Winship**, 397 U.S. at 364:

> "It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

Such doubt pervades the instant case.

## CONCLUSION

Because an act taken in self-defense is innocent conduct which is protected by the United States Constitution, the State cannot require an accused to bear the burden of proof on that issue because to do so would require the accused to prove her innocence in violation of the principle announced in **In re**

**Winship.** Equally as important, a functional analysis demonstrates that proof of self-defense necessarily negates several ingredients of the crime which the State must prove in order to establish guilt beyond a reasonable doubt. Consequently, the principles announced in **Mullaney** and **Patterson** prohibit the placement of the burden of proof upon the issue of self-defense on the accused.

Accordingly, the judgment of the Ohio Supreme Court below should be reversed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b) of this Court, I, Gregory L. Ayers, a member of the bar of this Court, hereby certify that on this _____ day of July, 1986, three copies of the foregoing Brief for Ohio Public Defender Commission As **Amicus Curiae** In Support Of Petitioner were mailed, first-class postage prepaid, to JAMES R. WILLIS, Esquire, Suite 610, Bond Court Building, 1300 East Ninth Street, Cleveland, Ohio 44114, Counsel for Petitioner; and to JOHN T. CORRIGAN, Cuyahoga County Prosecuting Attorney, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, Counsel for Respondent. I further certify that all parties required to be served have been served. Petitioner Earline Martin's address is: Ohio State Reformatory for Women, 1479 Collins Avenue, Marysville, Ohio 43040.

_____
GREGORY L. AYERS
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# A P P E N D I X

## FEDERAL CASES TREATING STATE LAW WITH RESPECT TO SELF-DEFENSE AND THE BURDEN OF PROOF

### Fourth Circuit

**Guthrie v. Warden**, 683 F.2d 820 (4th Cir. 1982) [Maryland law: self-defense exonerates an accused of any degree of culpable homicide].

**Wynn v. Mahoney**, 600 F.2d 448 (4th Cir.), **cert. denied**, 444 U.S. 950 (1979) [North Carolina law: self-defense negates unlawfulness].

**Sarah Thomas v. William D. Leeke**, 725 F.2d 246 (4th Cir. 1983), **cert. denied**, 469 U.S. ___, 105 S.Ct. 18, 83 L.Ed.2d 148 (1984). Though the decision in this case is based upon a finding of confusion between the instructions upon the state's burden to prove guilt beyond a reasonable doubt and the defendant's burden to prove self defense, it is clear that the underlying problem was that the Court found self-defense to be inconsistent with guilt.

**Frazier v. Weatherholtz**, 572 F.2d 994, 995 (4th Cir. 1978), **cert. denied**, 439 U.S. 876 (1978) [Virginia law: no infirmity in requiring defendant to establish self-defense "to the extent of raising . . . a reasonable doubt as to whether or not he acted in the lawful exercise of such right"]; **Baker v. Muncy**, 619 F.2d 327 (4th Cir. 1980) [Virginia law: following **Frazier**]. **See** discussion of **Frazier** in **Griffin v. Martin**, 785 F.2d 1172 (4th Cir. 1986) at 1187-1189 (J. Murnaghen) (pending for rehearing **en banc**); **cf.** 1194 (J. Sneeden, dissenting).

## Fifth Circuit

**Tennon v. Ricketts**, 642 F.2d 161 (5th Cir. 1981) [Georgia law: self-defense negates unlawfulness]; **McElroy v. Holloway**, 632 F.2d 605 (5th Cir. 1980), **cert. denied**, 451 U.S. 1028 (1981) [Georgia law: self-defense negates unlawfulness].

## Sixth Circuit

**Compare Carter v. Jago**, 637 F.2d 449 (6th Cir. 1980), **cert. denied**, 456 U.S. 980 (1982); **Thomas v. Arn**, 704 F.2d 865 (6th Cir. 1983); **Nieb v. Jago**, 695 F.2d 228 (6th Cir. 1982), **cert. denied**, 463 U.S. 1210; **Jones v. Jago**, 701 F.2d 45 (6th Cir. 1983), **cert. denied**, 464 U.S. 914; **Long v. McKeen**, 722 F.2d 286 (6th Cir. 1983), **cert. denied**, 465 U.S. 1106 (1984); **Melchior v. Jago**, 723 F.2d 486 (6th Cir. 1983), **cert. denied**, 466 U.S. 952 (1984) (Contie, J., concurring), **White v. Arn**, 788 F.2d 338 (6th Cir. 1986), **petition for writ of certiorari pending**, and **Wilson v. McMacken**, 786 F.2d 216 (6th Cir. 1986), rejecting arguments similar to those presented in the instant case **with Hooper v. Perini**, 641 F.2d 445, 446 (6th Cir. 1981), **cert. denied**, 454 U.S. 817; **Thomas v. Arn**, 704 F.2d 865, 876, n. 13 (6th Cir. 1983) [indicating that self-defense negated the malice element under the pre-1974 Ohio murder statute] and **Isaac v. Engle**, 646 F.2d 1129, 1136 (6th Cir. 1980) (**en banc**) (Edwards, C.J., concurring), **rev'd on other grounds sub nom. Engle v. Isaac**, 456 U.S. 107 (1984). It should also be noted that in **Webster v. Engle**, 721 F.2d 566, 569 (6th Cir. 1983), and **Melchior v. Jago**, 723 F.2d 486, 492 (6th Cir. 1984), **cert. denied**, 466 U.S. 952, it was indicated that the question of whether it was unconstitutional to place the burden of proof on the issue of self-defense was one which

was "open" and still not resolved within the Circuit.

**Eleventh Circuit**

**See Lamb v. Jernigan**, 683 F.2d 1332, 1336 (11th Cir. 1982), **cert. denied**, 460 U.S. 1024 (1983) [Georgia law: self-defense negates malice] (**dicta**).

## BURDENS OF PROOF ON SELF-DEFENSE IN VARIOUS STATES

Type A: The defendant has no burden other than the assertion of self-defense, as the absence of self-defense is considered an element of the offense.

Type B: The defendant has the burden of going forward with the evidence showing self-defense. The quality of the evidence required varies from state to state. The range is "some credible evidence" to "evidence sufficient to create a reasonable doubt in the minds of the jurors." Once the defendant has met this burden of production, the state must show the absence of self-defense or the defendant is acquitted.

Type C: In order to be acquitted, the defendant must prove by a preponderance of the evidence that he acted in self-defense.

## AUTHORITIES FOR BURDENS OF PROOF IN THE VARIOUS STATES

TYPE A

| | |
|---|---|
| Louisiana | **State v. Brown**, 414 So.2d 726 (La. 1982); **State v. Buchanan**, 439 So.2d 576 (So. App. 1983) |
| Oregon | Oregon Revised Statutes §§ 161.055, 161.190 and 161.209 |

TYPE B

| | |
|---|---|
| Alabama | **Henson v. State**, 112 Ala. 41, 21 So. 79 (1896), **overruled on other grounds, McGhee v. State**, 178 Ala. 4, 59 So. 573 (1912); **Lester v. State**, 121 So.2d 110 (Ala. 1960); **Ex Parte Allen Johnson**, 433 So.2d 479 (Ala. 1983). |
| Alaska | Alaska Statutes §§ 11.81.330, 11.81.335, 11.81.300, 11.81.900(15); **Brown v. State**, 698 P.2d 671 (Alaska Ct. App. 1985); **Weston v. State**, 682 P.2d 1119 (Alaska 1984). |

TYPE B (con't)

| | |
|---|---|
| Arizona | **State v. Hunter**, 142 Ariz. 88, 688 P.2d 980 (1984); **State v. Saurevathong**, 130 Ariz. 461, 636 P.2d 1243 (Ariz. App. 1981). |
| Arkansas | Arkansas Statutes Annotated §§ 41-110(3), 41-506, 41-507; **Peals v. State**, 266 Ark. 410, 584 S.W.2d 1 (1979). |
| California | **People v. Adrian**, 134 Cal. App.3d 443, 184 Cal. Rptr. 592 (Ct. App. 1982), **on rehearing**, 135 Cal. App.3d 335, 185 Cal. Rptr. 506 (Ct. App. 1982). |
| Colorado | Colorado Revised Statutes §§ 18-1-407 and 18-1-704. |
| Connecticut | Connecticut General Statutes Annotated §§ 53a-19, 53a-16, 53a-12; **State v. Hardwick**, 1 Conn. App. 609, 475 A.2d 315 (Conn. App. 1984). |
| Delaware | Delaware Code Annotated §§ 11-464, 11-461, 11-303. |

TYPE B (con't)

| | |
|---|---|
| Dst. of Columbia | No dispositive authority. |
| Florida | **Brown v. State**, 454 So.2d 596 (Fla. App. 1984). |
| Georgia | **Walden v. State**, 251 Ga. 505, 307 S.E.2d 474 (Ga. 1983). |
| Hawaii | Hawaii Revised Statutes §§ 703-301, 701-115(2)(a), and 703-304; **State v. Sanchez**, 636 P.2d 1365 (Hawaii App. 1981); **State v. Reclina**, 616 P.2d 229 (Hawaii App. 1980). |
| Idaho | **State v. Jurko**, 245 P. 685 (1926). |
| Illinois | Illinois Revised Statutes Chapter 38, §§ 7-1 and 3-2. |
| Indiana | **Clark v. State**, 159 Ind. 60, 64 N.E. 589 (1902); **Lawson v. State**, 171 Ind. 431, 84 N.E. 974 (1908); **McCann v. State**, 466 N.E.2d 421 (Ind. 1984). |

TYPE B (con't)

| | |
|---|---|
| Iowa | **State v. Sharkey**, 311 N.W.2d 68 (1981); **State v. Overstreet**, 243 N.W.2d 880 (1976). |
| Kansas | **State v. Smith**, 161 Kan. 230, 167 P.2d 594 (1946); **State v. Beard**, 220 Kan. 580, 552 P.2d 900 (1976). |
| Kentucky | Kentucky Revised Statutes §§ 503.050 and 500.070(1). |
| Maine | Maine Revised Statutes Annotated Chapter 17A §§ 108 and 101(1); **State v. Lagasse**, 410 A.2d 537 (Me. 1980). |
| Maryland | **Squire v. State**, 280 Md. 132, 368 A.2d 1019 (1977); **State v. Evans**, 278 Md. 197, 362 A.2d 629 (1976). |
| Massachusetts | **Commonwealth v. Kamishlian**, 21 Mass. App. 931, 486 N.E.2d 743 (Mass. App. 1985); **Commonwealth v. Rodriguez**, ___ Mass. ___, 352 N.E.2d 203 (1976). |

TYPE B (con't)

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| Michigan | **People v. Coughlin**, 65 Mich. 704, 32 N.W. 905 (Mich. 1887); **People v. Stallworth**, 364 Mich. 528, 111 N.W.2d 742 (Mich. 1961); **People v. Norwood**, 333 N.W.2d 255 (Mich. App. 1983). |
| Minnesota | **State v. McPherson**, 114 Minn. 498, 131 N.W. 645 (1911); **State v. Graham**, 371 N.W.2d 204 (Minn. 1985). |
| Mississippi | **Ford v. State**, 73 Miss. 734, 19 So. 665 (1896); **Hampton v. State**, 99 Miss. 176, 54 So. 722 (1911). |
| Missouri | Missouri Revised Statutes §§ 563.031 and 556.051. |
| Montana | **State v. Lopez**, 185 Mont. 187, 605 P.2d 178 (1980); **State v. Grady**, 166 Mont. 168, 531 P.2d 681 (1975); Montana Code Annotated § 45-3-115 (1984). |
| Nebraska | **State v. Samuels**, 205 Neb. 585, 289 N.W.2d 183 (1980). |
| Nevada | **St. Pierre v. State**, 96 Nev. 888, 620 P.2d 1240 (1980); **Kelso v. State**, 95 Nev. 37, 588 P.2d 1035 (1979). |

TYPE B (con't)

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| New Hampshire | New Hampshire Revised Statutes Annotated §§ 626: 7(I)(a) and 627: 4(II)(a). |
| New Jersey | **State v. Gardner**, 51 N.J. 444, 242 A.2d 1 (1968); **State v. Chiarello**, 69 N.J. Super. 479, 174 A.2d 506 (1961). |
| New Mexico | **State v. Martinez**, 95 N.M. 421, 622 P.2d 1041 (1981); **State v. Cochran**, 78 N.M. 292, 430 P.2d 863 (1967). |
| New York | New York Penal Law 25.00, 35.00, and 35.10 (McKinney 1965). |
| North Carolina | **State v. Herbin**, 298 N.C. 441, 259 S.E.2d 263 (1979); **State v. Hankerson**, 288 N.C. 632, 220 S.E.2d 575 (1975). |
| North Dakota | **State v. Hazlet**, 16 N.D. 426, 113 N.W. 374 (1907). |
| Oklahoma | **Cottrel v. State**, 458 P.2d 328 (1969). |

TYPE B (con't)

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| Pennsylvania | **Commonwealth v. Schaller**, 493 Pa. 426, 426 A.2d 1090 (1981); **Commonwealth v. Black**, 376 A.2d 627 (1977). |
| Rhode Island | **In re Doe**, 390 A.2d 920 (1978). |
| South Dakota | **State v. Reddington**, 80 S.D. 390, 125 N.W.2d 58 (1963); **State v. Wilcox**, 48 S.D. 289, 204 N.W. 369 (1925). |
| Tennessee | **Henley v. State**, 520 S.W.2d 361 (1974); **Myers v. State**, 185 Tenn. 264, 206 S.W.2d 30 (1947). |
| Texas | **Luck v. State**, 588 S.W.2d 371 (1979). |
| Utah | **State v. Torres**, 619 P.2d 694 (1980). |
| Virginia | **McGhee v. Commonwealth**, 219 Va. 560, 248 S.E.2d 808 (1978); **Frazier v. Weatherholz**, 572 F.2d 994 (4th Cir. 1978). |

TYPE B (con't)

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| Washington | **State v. McCullum**, 98 Wash.2d 484, 656 P.2d 1064 (1983); **State v. Hanton**, 94 Wash.2d 129, 614 P.2d 1280 (1980). |
| West Virginia | **Bowman v. Leverette**, 289 S.E.2d 435 (1982); **State v. Kirtley**, 252 S.E.2d 374 (1978). |
| Wisconsin | **State v. Staples**, 99 Wis.2d 364, 299 N.W.2d 270 (1980). |
| Wyoming | **Schiekofsky v. State**, 636 P.2d 1107 (1981); **Loy v. State**, 26 Wyo. 381, 185 P. 796 (1919). |

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| Ohio | Ohio Revised Code § 2901.05(A) (1982). |
| South Carolina | **State v. Bolton**, 266 S.C. 444, 223 S.E.2d 863 (1976). |